

DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D. C. 20548

10,112

FILE: B-193676

DATE: May 11, 1979

MATTER OF: Shelby-Skipwith, Inc. DLG 01546

[Protest Alleging Awardee's Bid Was Nonresponsive]

DIGEST:

1. Protest against procuring activity's waiver of low bidder's failure to acknowledge receipt of material amendment to invitation for bids (IFB) is denied. Amendment to specification predates and was bound within IFB package, expressly provides for incorporation of changes in IFB specifications, and was therefore part of IFB in response to which bid was submitted which bound bidder to perform in accordance with amended specifications.
2. Low bid submitted on revised bid form attached to amendment to IFB which provided for 60-day bid acceptance period, a requirement included only in amendment, constitutes constructive acknowledgment of amendment binding bidder to perform all changes included in amendment at price bid. Failure to formally acknowledge receipt of amendment was properly treated as minor informality and waived by procuring activity.
3. Low bidder's failure to acknowledge receipt of amendment which merely gives bidders option of providing alternate materials in lieu of those originally required by IFB may be waived as minor informality because amendment does not materially affect price, quantity, quality or delivery of IFB requirements.
4. Low bidder's failure to submit Standard Form (SF) 19-B, Representations and Certifications, with bid does not render bid nonresponsive to IFB. Information required by SF 19-B applies to determination of bidder's responsibility, not bid responsiveness, and may be supplied after bid opening.

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DLG 01546

Shelby-Skipwith, Inc. (Shelby) has protested the award of a contract by the United States Department of Labor (Labor), Employment and Training Administration to Roger R. Johnson Construction Company, Inc. (Johnson) under invitation for bids (IFB) No. IFB-ONP-78-37-JC. DLG 01547

The IFB was issued on October 10, 1978, for construction and remodeling work following an August 1978 solicitation for the same project which was canceled because only one bid which far exceeded Labor's budget was received.

An amendment to the plans and specifications (Addendum No. 1) issued on October 9, 1978, was bound within the plans and specifications distributed to the prospective bidders. Addendum No. 2, issued on October 22, 1978, changed the bid acceptance period from 30 to 60 calendar days and added to subparagraph 9F-04(b), Metal Stud Partitions, that "[m]etal studs for new walks around space D106 theater shall be 20 gage, 4". A revised page 2 of Standard Form (SF) 21, Bid Form (Construction Contract), stipulating the 60-day bid acceptance period was attached to the addendum. Addendum No. 3, issued on November 3, 1978, modified the plans to allow contractors at their option to substitute materials for those in the IFB in two instances. The ultimate paragraph of the three addenda provides as follows:

"The foregoing changes shall be incorporated in the Specifications.
A copy of this Addendum must be attached to and shall become a part of the Contract Documents."

The two lowest of five bids received at bid opening on November 7, 1978, were Johnson's at \$1,286,318, and Shelby's at \$1,391,443. The abstract of bids shows that Johnson did not acknowledge any of the amendments, and that Johnson did not submit an SF 19-B, "Representations and Certifications (Construction and Architect-Engineer Contract)." DOL advised Shelby by letter of December 6,

1978, that the procuring activity was waiving Johnson's failure to acknowledge the amendments and submit an SF 19-B as minor informalities and planned to accept Johnson's bid. The contract was awarded to Johnson on December 6, 1978, and the three addenda were included in the contract.

Shelby contends that the amendments which Johnson failed to acknowledge had a significant effect on the price and quantity of work required by the IFB, that Johnson's bid should therefore be rejected as nonresponsive, and that award should be made to Shelby as the low, responsive bidder, citing our decision in B-166333, April 8, 1969.

More specifically, Shelby states that, because Johnson received plans and specifications for the project with the August 1978 solicitation and it is unusual to issue a simultaneous amendment, Johnson may have bid on the basis of the unamended prior solicitation, overlooking Addendum No. 1. The Addendum No. 2 requirement for 20-gage metal studs is nearly double the weight of the studs originally specified and greatly increases the cost of the material and labor required. Johnson's use of the revised bid form attached to the addendum does not necessarily indicate that the firm also considered the specification change. The protester concludes that the only way to determine whether an amendment was received and considered is to have it acknowledged, as provided in the bid form. See Federal Procurement Regulations (FPR) §§ 1-2.207(b)(4) and 1-16.901-30 (1964 ed. amend. 26).

The general rule is that a bidder's failure to acknowledge receipt of an amendment which contains a material requirement by bid opening renders the bid nonresponsive. B-177747, April 11, 1973; Aetna Ambulance Service, Inc., et al., B-190187, March 31, 1978, 78-1 CPD 258. Failure

to acknowledge receipt of an amendment to an IFB may be waived or cured as a minor informality or irregularity if the bid clearly indicates that the bidder received the amendment or the amendment involves only a matter of form or has either no effect or a trivial or negligible effect on price, quantity, quality or delivery of the bid items. FPR § 1-2.405(d) (1964 ed. circ. 1).

We believe that the protester's reliance on our decision in B-166333, April 23, 1969, is misplaced. That decision dealt with a procurement conducted pursuant to the Armed Services Procurement Regulation (ASPR) [now Defense Acquisition Regulation] at a time when ASPR § 2-405 was so worded that failure to acknowledge an amendment could not properly be waived unless the amendment had no effect on the price, quality, quantity or delivery of the supplies or services being procured. We felt that the wording of the regulation produced harsh results, like those in that decision, and recommended that consideration be given to amending the ASPR provision to conform to the more liberal policy expressed by FPR § 1-2.405, which applies to the instant procurement.

We have held that where the bid itself includes one of the essential items appearing only in a bid amendment, the bidder's failure to acknowledge that amendment may properly be treated as a minor informality. B-176462, October 20, 1972; Algernon Blair, Inc., B-182626, February 4, 1975, 75-1 CPD 76. In the instant case, Johnson submitted its bid on the revised bid form attached to Addendum No. 2 which includes a provision by which the bidder agreed to the amended bid acceptance period of 60 calendar days. A bid acceptance period of that duration was not specified in the IFB and appears only in Addendum No. 2. Johnson's failure to formally acknowledge the second amendment was therefore properly waived by DOL as a minor informality or irregularity in the bid. Contrary to the protester's assertion,

Johnson's bid constitutes constructive acknowledgment of receipt of the second amendment so as to bind Johnson to perform all of the changes enumerated in that amendment at the price bid. It is the bidder's failure to acknowledge receipt of the amendment in the particular form prescribed, rather than compliance with the requirements of the amended solicitation, which is waived. B.R. Abbot Construction Company, B-186263, May 26, 1976, 76-1 CPD 344. In any event, the agency determined that the change in stud size had only a trivial or negligible effect on the procurement.

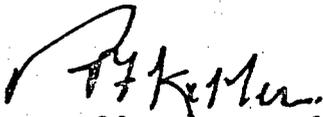
Furthermore, the terms of the bid form state that in compliance with the IFB, the bidder proposes "to perform all work * * * in strict accordance with the * * * specifications, schedules, drawings and conditions," for the amount bid. Addendum No. 1, dated October 9, 1978, which was bound within the IFB package expressly provides that the changes so effected are incorporated on the IFB specifications. The IFB issued on October 10, 1978, was therefore the IFB as amended by Addendum No. 1. In our opinion Johnson's bid in response to the amended IFB bound the firm to perform in accordance with the specifications as amended by Addendum No. 1. See B-166445, August 25, 1969.

Johnson's failure to acknowledge receipt of Addendum No. 3 is properly waivable as a minor informality because the amendment has no effect on the price, quantity, quality or delivery of the work. FPR § 1-2.405(d)(2) (1964 ed. circ. 1). The addendum merely offers bidders an option to substitute alternate materials for those originally specified in the IFB. DOL states that either of the materials is equally acceptable and that the items had no material effect on the project cost. Shelby has neither asserted nor proved that the addendum has any material effect on the specifications. In any event, Johnson was bound by its bid to furnish the materials originally specified in the IFB and its bid is therefore responsive to the IFB in this regard.

Furthermore, a bidder's failure to submit SF 19-B does not render the bid nonresponsive. The information required by the SF 19-B is necessary to determine the responsibility of the bidder, rather than the responsiveness of the bid, and may be submitted after bid opening. L. Reese & Sons, Inc., B-182050, November 11, 1974, 74-2 CPD 255.

Shelby also takes exception to the fact that DOL made award to Johnson prior to the resolution of its protest on the grounds that when a protest has been filed with our Office prior to award, the procuring activity may not proceed with the award except as provided in FPR § 1-2.407-8(b)(3) and (4) (1964 ed. amend. 68). Because Shelby's protest was not filed with our Office until December 11, 1978, 5 days after the contract was awarded to Johnson, that regulation is clearly not applicable to the factual situation before us.

The protest is denied.


Deputy Comptroller General
of the United States